

9/3/03~003

for pg 7-8

PROPOSED CHANGE TO SECTION 16 OF LRB-0349/P1

SECTION 16. 705.04 (2) (d) of the statutes is created to read:

705.04 (2) (d) If any P.O.D. beneficiary predeceases the original payee or the survivor of 2 or more original payees, ~~any written instructions that the owner filed with the financial institution determine the rights of the P.O.D. beneficiaries. If the owner left no applicable written instructions,~~ the amount to which the predeceased P.O.D. beneficiary would have been entitled passes to any of his or her issue who would take under s. 854.06 (3), subject, however, to the rights of financial institutions under s. 705.06 (1) (c), as amended.

Committee Note: The indicated provision is deleted from the proposed legislation because of a compelling argument by representatives of financial institutions that it would be difficult to administer. Similar language appears in the existing statute [see amended § 705.04[2]], but has been handled by standard language in the account agreement, which essentially provides that the option is not available. The reference to 705.06[1][c] is added to clarify that financial institutions can pay to the named beneficiaries; the rights of the issue of a predeceased beneficiary are against the other beneficiaries, not against the financial institution holding the account. See also amendments to § 705.06.

9/3/03 2003

for pg 8.
✓

PROPOSED AMENDMENTS TO § 705.06

705.06 Protection of financial institutions. (1) In accordance with the terms of an account, and subject to this subchapter, ch. 112 and the duties prescribed for personal representatives in ch. 72 and unless otherwise ordered by a court of competent jurisdiction:

(a) A financial institution may on request pay any sums on deposit in the account to any party or agent; and the financial institution shall not be required to look into the source of funds received for deposit or the proposed application of any funds withdrawn or requested to be withdrawn.

(b) Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is under legal disability or is deceased at the time the payment is requested.

(c) Any sums in a P.O.D. account may be paid, on request, to the P.O.D. beneficiary or beneficiaries upon presentation to the financial institution of proof of death showing that the P.O.D. beneficiary or beneficiaries survived all persons named as original payees of the account. If there is more than one P.O.D beneficiary named and one or more of them have predeceased, sums in the account may be paid to the surviving P.O.D. beneficiaries upon presentation of proof of death of the others, without regard to claims by the issue of a predeceased beneficiary under s. 705.04[2][d]. If none of the named P.O.D beneficiaries survive, the sums in the account may be paid to the estate of the deceased sole owner or the estate of the last to die of multiple owners, without regard to claims by the issue of a predeceased beneficiary under s. 705.04[2][d].

(d) - [section (d) is not reprinted here, but is to be retained]

Committee Note: This amendment clarifies that it is not the obligation of the financial institution to determine whether the issue of a predeceased POD beneficiary qualify to take under the "anti-lapse" provision. If the institution chooses to pay to the surviving named beneficiaries, issue who qualify under the anti-lapse provision are protected under renumbered sub [3].

(2) Payment made under this subchapter discharges the financial institution from all claims for amounts so withdrawn. If the institution has reason to believe that a dispute exists as to the rights of the parties to an account or their successors it may, but shall not be required to, refuse to pay funds in the account to any persons pending instructions from a court, or it may pay the proceeds to a court. An institution may but need not recognize the authority of an agent, other than one with continuing authority under s. 705.05 (3), until it knows of the fact of death or adjudication of incompetence of all parties appointing such agent and has reasonable opportunity to act. ~~The protection provided by this section shall have no bearing on the rights of parties or their successors in disputes concerning the beneficial ownership of funds in or withdrawn from an account.~~

[3] The protection provided by this section shall have no bearing on the rights of parties or their successors in disputes concerning the beneficial ownership of funds in or withdrawn from an account.

continued →

for page 8 - continued

Committee note: This important provision is separated off from sub [2] in order to highlight it. Sub [2] provides certain protections for the financial institution. Renumbered sub [3] provides protection for a different class, the owners and beneficiaries of an account.

for page 8

705.21(12)

Please add the underlined language to the definition of "Security account."

Security account means any of the following: (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, cash equivalents, interest, earnings or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner's death, (ii) an investment agency, investment management or custody account with a trust company or a trust division of a bank with trust powers, including the securities in the account, a cash balance in the account, and cash, cash equivalents, interest, earnings or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death, or (iii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

COMMITTEE NOTE:

Under current law, securities and brokerage accounts may be registered in beneficiary form that takes effect upon the death of the owner pursuant to the Uniform TOD [Transfer On Death] Security Registration Act. However, the definition of "Security account" in the Uniform Act is not broad enough to include investment agency, management or custody accounts, which are generally products offered by trust departments. The revision allows these products to avoid probate by providing a statutory authorization for investment agency, management and custody accounts to use a beneficiary designation.

1

1 owners, the security belongs to the estate of the deceased sole owner or the estate of
2 the last to die of multiple owners.

3 **SECTION 20.** 766.31 (3) of the statutes is renumbered 766.31 (3) (b) (intro.) and
4 amended to read:

5 766.31 (3) (b) (intro.) Each spouse has a present undivided one-half interest
6 in each item of marital property, ~~but the marital property interest of the~~
7 ~~nonemployee spouse in a deferred employment benefit plan or in assets in an~~
8 ~~individual retirement account that are traceable to the rollover of a deferred~~
9 ~~employment benefit plan terminates at the death of the nonemployee spouse if he or~~
10 ~~she predeceases the employee spouse. subject to all of the following:~~ 1. to 4.

****NOTE: This section does not appear in an initial applicability provision

11 **SECTION 21.** 766.31 (3) (a) and (b) of the statutes are created to read:

12 766.31 (3) (a) Section 766.62 (5).

Please see attached sheets.

13 (b) 1. Spouses may provide in a marital property agreement that at the death
14 of a spouse some or all of their marital property will be divided based on aggregate
15 value rather than divided item by item.

16 2. The surviving spouse and the successor in interest to the decedent's share
17 of marital property may enter into an agreement providing that some or all of the
18 marital property in which each has an interest will be divided based on aggregate
19 value rather than divided item by item.

20 3. The court does not need a marital property agreement to recognize a division
21 of marital property that is not item by item.

22 4. This paragraph does not have to comply with the procedures under s. 857.03
23 (2).

****NOTE: Given subd. 4., I do not understand the proposed cross-reference to s.
766.31 (3) in s. 857.03 (2). This paragraph does not have to comply with s. 857.03 (2), but

The comments raise a good point regarding the interrelationship between 766.31[3] and 857.03[2]. The following material is offered as an alternative to what is in 0349/P1.

We believe that it is important to keep the language that explains what 766.62[5] refers to. Also, we would *very* much like to keep the subheadings. These are critically important exceptions, and one of them is new. The subheadings make them readily identifiable. If it is a problem to have headings for the subparts of subsections, when there are not headings the subsections themselves, we could come up with headings for the subsections as well.

Proposed 766.31^[3][a]:

[a] *Terminable interest in deferred employment benefit plan.* The marital property interest of the nonemployee spouse in a deferred employment benefit plan or in assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employee spouse, as provided in 766.62[5].

Proposed new section 766.31[3][b]:

[b] *Non pro rata division of marital property at death.* 1. Spouses may provide in a marital property agreement that at the death of a spouse some or all of their marital property will be divided based on aggregate value rather than item by item. However, a lifetime agreement between the spouses is not required in order to have a division of marital property that is not item by item at the death of a spouse.

2. The surviving spouse and a distributee who is a successor in interest to the decedent's share of marital property may enter into an agreement providing that some or all of the marital property in which they both have an interest will be divided based on aggregate value rather than item by item.

3. *[this is former 857.03[2]. The edits show the change from that provision.]* The surviving spouse and a distributee who is a successor in interest to all or part of the decedent's one-half interest in marital property may petition the court to approve an exchange of interests in the marital property authorized under sub [1] or [2], but court approval of the exchange is not required for the agreement under sub [1] or [2] to be effective. If the court approves the exchange, the personal representative surviving spouse and the distributee shall exchange their respective interests in 2 or more items of marital property and distribute the items in a manner to conform with the exchange. The exchange shall:



(a) Occur before the final distribution of the ~~estate~~ assets under the governing instrument;

(b) Be composed of items which are fairly representative of the appreciation and depreciation that has occurred since the date of death;

(c) Be composed of items having a fair market value at the time of exchange equal to what would have been distributed had no exchange request been made, including any money used in the exchange; and

(d) Be reported with a written description of each item, its basis and its fair market value at the time of exchange in the manner prescribed by the department of revenue.

Recreated 857.03[2]:

857.03 (2) The surviving spouse and the personal representative may petition the court to approve an exchange of interests in marital property as provided in s. ~~854.17[3]~~.

766.31(3)(b)



s. 857.03 (2), which begins "under s. 766.31 (3)," allows an exchange only if the parties comply with the procedures under s. 857.03 (2) (a) to (d). Should that cross-reference be deleted?

1 **SECTION 22.** 766.61 (7) of the statutes is amended to read:

2 766.61 (7) If Except as provided in s. 854.14 (3m) (b) 2., if a noninsured spouse
3 predeceases an insured spouse, the marital property interest of the decedent spouse
4 in a policy ~~which~~ that designates the surviving spouse as the owner and insured is
5 limited to a dollar amount equal to one-half of the marital property interest in the
6 interpolated terminal reserve and in the unused portion of the term premium of the
7 policy on the date of death of the deceased spouse. All other rights of the decedent
8 spouse in the ownership interest or proceeds of the policy, other than the marital
9 property interest described in this subsection, terminate at the decedent spouse's
10 death.

11 **SECTION 23.** 766.62 (4) of the statutes is renumbered 766.62 (4) (a).

12 **SECTION 24.** 766.62 (4) (b) of the statutes is created to read:

13 766.62 (4) (b) If a deferred employment benefit plan administrator has reason
14 to believe that a dispute exists as to the rights of parties, or their successors, to a
15 deferred employment benefit, the deferred employment benefit plan administrator
16 may do any of the following:

17 1. Deposit the payments with a court.

18 2. Refuse to make payments to any person *pending instructions from a court.*

19 **SECTION 25.** 766.62 (4) (c) of the statutes is created to read:

20 766.62 (4) (c) The protection afforded a deferred employment benefit plan
21 administrator under this subsection does not affect the rights of parties or their
22 successors in disputes concerning the beneficial ownership of deferred employment
23 benefits.

** see note
on separate
sheet.*

LRB 0349/P1

§ 24.

It seems that the additional language would be a useful clarification. If you agree, could you check for similar language elsewhere in the Statutes - our search didn't come up with any, but we don't have a good search engine and we think the language here was modeled on language elsewhere in Chp 700, 701, 705, 851-880, or 766
Thanks.

1 **SECTION 26.** 766.62 (5) (intro.) of the statutes is amended to read:

2 766.62 (5) (intro.) ~~If~~ Except as provided in s. 854.14 (3m) (c), if the nonemployee
3 spouse predeceases the employee spouse, the marital property interest of the
4 nonemployee spouse in all of the following terminates at the death of the
5 nonemployee spouse:

6 **SECTION 27.** 767.266 (1) (b) of the statutes is amended to read:

7 767.266 (1) (b) That one or both spouses will make a particular disposition in
8 a will or other governing instrument, as defined in s. 854.01 (2).

9 **SECTION 28.** 851.055 (1m) of the statutes is created to read:

10 851.055 (1m) Is not classified as individual property or marital property under
11 a valid marital property agreement, unless the marital property agreement provides
12 otherwise.

*Please
see
separate
sheet*

****NOTE: The property becomes deferred marital property unless the agreement classifies the property as individual or marital, unless the agreement provides otherwise. But if the agreement provided otherwise, wouldn't the agreement classify the property? And how else could the agreement classify the property — an agreement would not classify property as deferred marital property. I do not understand what "unless the marital property agreement provides otherwise" adds.

****NOTE: This section does not appear in an initial applicability provision. 1999

13 **SECTION 29.** 851.21 (1) (b) of the statutes is amended to read:

14 851.21 (1) (b) ~~A- Except as provided in s. 853.32 (2) (e), a~~ beneficiary named in
15 any document offered for probate as the will of the decedent and includes a person
16 named or acting as a trustee of any trust, inter vivos or testamentary, named as a
17 beneficiary.

18 **SECTION 30.** 851.31 of the statutes is amended to read:

19 **851.31 Will.** "Will" Unless the context or subject matter indicates otherwise,
20 "will" includes a codicil and any document incorporated by reference in a
21 testamentary document under s. 853.32 (1) or (2). "Will" does not include a copy,

LRB 0349/P1

§ 28 drafter's note.

Our thought is that a mpa could make some provision regarding unclassified property that is different from the provisions for deputed mp in Chap 861. You are correct that there are only 2 classifications, but a mpa might deal with other categories of property, or it might name certain specific assets + say what happens to them without classifying them.

1 unless the copy has been proven as a will under s. 856.17, but “will” does include a
2 properly executed duplicate original.

3 **SECTION 31.** 851.50 of the statutes is amended to read:

4 **851.50 Status of adopted persons.** The status of adopted persons for
5 purposes of inheritance and transfers under wills or other governing instruments,
6 as defined in s. 854.01 (2), is governed by ss. 854.20 and 854.21.

7 **SECTION 32.** 852.01 (1) (a) 2. of the statutes is renumbered 852.01 (1) (a) 2.
8 (intro.) and amended to read:

9 852.01 **(1)** (a) 2. (intro.) If there are surviving issue one or more of whom are
10 not issue of the surviving spouse, one-half of decedent’s property other than the
11 following property:

12 a. The decedent’s interest in marital property.

13 **SECTION 33.** 852.01 (1) (a) 2. b. of the statutes is created to read:

14 852.01 **(1)** (a) 2. b. The decedent’s interest in property held equally and
15 exclusively with the surviving spouse as tenants in common.

16 **SECTION 34.** 852.01 (1) (b) of the statutes is amended to read:

17 852.01 **(1)** (b) To the issue, per stirpes, the share of the estate not passing to the
18 spouse under par. (a), or the entire estate if there is no surviving spouse. ~~If there are~~
19 ~~issue other than children, those of more remote degrees take per stirpes.~~

20 **SECTION 35.** 852.12 of the statutes is amended to read:

21 **852.12 Debts to decedent.** If an heir owes a debt to the decedent, s. 854.12
22 governs the treatment of that ~~debt shall be charged against the intestate share of the~~
23 ~~debtor, regardless of whether the debt has been discharged in bankruptcy. If the~~
24 ~~debtor fails to survive the decedent, the debt shall not be taken into account in~~
25 ~~computing the intestate shares of the debtor’s issue.~~

*please see
additional note
re 853.03.*

1 **SECTION 36.** 853.03 (2) (intro.) of the statutes is amended to read:
2 853.03 (2) (intro.) It must be signed by 2 or more witnesses, ^{at least 2} each of whom
3 ^{each} signed within a reasonable time after ~~witnessing~~ any of the following:

4 **SECTION 37.** 853.03 (2) (a) of the statutes is amended to read:

5 853.03 (2) (a) The signing of the will as provided under sub. (1), in the conscious
6 presence of the witness.

7 **SECTION 38.** 853.03 (2) (b) of the statutes is amended to read:

8 853.03 (2) (b) The testator's implicit or explicit acknowledgement of the
9 testator's signature on the will, ~~within~~ in the conscious presence of ~~each of the~~
10 ~~witnesses~~ witness.

11 **SECTION 39.** 853.03 (2) (c) of the statutes is amended to read:

12 853.03 (2) (c) The testator's implicit or explicit acknowledgement of the will,
13 ~~within~~ in the conscious presence of ~~each of the witnesses~~ witness.

14 **SECTION 40.** 853.04 (3) of the statutes is repealed and recreated to read:

15 853.04 (3) EFFECT OF AFFIDAVIT. The effect of an affidavit in substantially the
16 form under sub. (1) or (2) is as provided in s. 856.16.

17 **SECTION 41.** 853.11 (2) of the statutes is renumbered 853.12, and 853.12 (1), (2)
18 (intro.), (b) and (c), (3) (intro.) and (4) (intro.) and (b), as renumbered, are amended
19 to read:

20 ^{PREMARITAL WILL} 853.12 (1) ENTITLEMENT OF SURVIVING SPOUSE ~~UNDER A PREMARITAL WILL~~. Subject
21 to ~~par. (c)~~ sub. (3), if the testator married the surviving spouse after the testator
22 executed his or her will, the surviving spouse is entitled to a share of the probate
23 estate.

24 (2) VALUE OF SHARE. (intro.) The value of the share under ~~par. (a)~~ sub. (1) is the
25 value of the share that the surviving spouse would have received had the testator

Additional request re s. 853.03

To remove any ambiguity concerning how the provisions of s. 853.03 should be read, the committee strongly believes that an additional provision such as the following is necessary:

"There is no requirement that the two required witnesses observe the signing or acknowledgment under [sub 2] at the same time."

1 died with an intestate estate equal to the value of the net estate of the ~~decedent~~
2 testator less the value of all of the following:

3 (b) All devises to or for the benefit of the issue of a child described in ~~subd. 1.~~
4 par. (a).

5 (c) All devises that pass under s. 854.06, 854.07, 854.21, or 854.22 to or for the
6 benefit of children described in ~~subd. 1.~~ par. (a) or issue of those children.

7 (3) EXCEPTIONS. (intro.) ~~Paragraph (a)~~ Subsection (1) does not apply if any of
8 the following applies:

9 (4) PRIORITY AND ABATEMENT. (intro.) In satisfying the share provided by this
10 ~~subsection~~ section:

11 (b) Devises other than those described in ~~par. (b) 1. to 3.~~ sub. (2) (a) to (c) abate
12 as provided under s. 854.18.

13 **SECTION 42.** 853.11 (2m) of the statutes is created to read:

14 853.11 (2m) PREMARITAL WILL. Entitlements of a surviving spouse under a
15 decedent's will that was executed before marriage to the surviving spouse are
16 governed by s. 853.12.

17 **SECTION 43.** 853.11 (3) of the statutes is amended to read:

18 853.11 (3) ~~FORMER SPOUSE~~ REVOCATION BY DIVORCE. ~~The effect of a~~ A transfer
19 under a will to a former spouse is governed by s. 854.15.

20 **SECTION 44.** 853.11 (6) (c) of the statutes is amended to read:

21 853.11 (6) (c) If a subsequent will that wholly or partly revoked a previous will
22 is itself revoked by another, later will, the previous will or its revoked part remains
23 revoked, unless it or its revoked part is revived. The previous will or its revoked part
24 is revived to the extent that it appears from the terms of the later will, or from the

1 testator's contemporary or subsequent declarations, that the testator intended the
2 previous will or its revoked part to take effect.

3 **SECTION 45.** 853.11 (6) (d) of the statutes is amended to read:

4 853.11 **(6)** (d) In the absence of an original valid will, ~~establishment of the~~
5 execution and validity of the revived will or part ~~is governed by~~ may be established
6 as provided in s. 856.17.

7 **SECTION 46.** 853.32 (1) of the statutes is renumbered 853.32 (1) (am).

8 **SECTION 47.** 853.32 (1) (bm) of the statutes is created to read:

9 853.32 **(1)** (bm) A writing or document is incorporated into a will under par.
10 (am) even if the writing or document is not executed in compliance with s. 853.03 or
11 853.05.

12 **SECTION 48.** 853.32 (2) (a) of the statutes is amended to read:

13 853.32 **(2)** (a) A reference in a will ~~executed on or after May 3, 1996,~~ to another
14 document that lists tangible personal property not otherwise specifically disposed of
15 in the will disposes of that property if the other document describes the property and
16 the distributees with reasonable certainty and is signed and dated by the decedent.
17 The court may enforce a document that is not dated but that fulfills all of the other
18 requirements under this paragraph.

19 **SECTION 49.** 853.32 (2) (b) of the statutes is renumbered 853.32 (2) (b) (intro.)
20 and amended to read:

21 853.32 **(2)** (b) (intro.) Another document under par. (a) is valid even if it any of
22 the following applies:

23 1. The document does not exist when the will is executed, ~~even if it.~~

24 2. The document is changed after the will is executed ~~and even if it.~~

1 3. The document has no significance except for its effect on the disposition of
2 property by the will.

3 **SECTION 50.** 853.32 (2) (b) 4. of the statutes is created to read:

4 *(am)? following up suggestion in drafter's notes.*
5 853.32 (2) ~~(b) 4.~~ The document was signed in compliance with s. 853.03 (1) or
6 with the law of the place where the document was signed, or where the testator
7 resided, was domiciled, or was a national at the time the document was signed or at
8 the time of death, but was not otherwise executed in compliance with s. 853.03 (2)
or 853.05.

9 **SECTION 51.** 854.01 of the statutes is renumbered 854.01 (intro.) and amended
10 to read:

11 **854.01 Definition Definitions.** (intro.) In this chapter, “governing:

12 (2) “Governing instrument” means a will; a deed; a trust instrument; an
13 insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or
14 similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a
15 beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an
16 instrument that creates or exercises a power of appointment; or any other
17 dispositive, appointive, or nominative instrument that transfers property at death.

18 **SECTION 52.** 854.01 (1) of the statutes is created to read:

19 854.01 (1) “Extrinsic evidence” means evidence that would be inadmissible
20 under the common law parol evidence rule or a similar doctrine because the evidence
21 is not contained in the governing instrument to which it relates.

22 **SECTION 53.** 854.03 (2) (b) of the statutes is amended to read:

23 854.03 (2) (b) Except as provided in sub. (5), if property is transferred under
24 a governing instrument that establishes 2 or more co-owners with right of
25 survivorship, and if ~~it is not established that~~ at least one of the co-owners survived

1 did not survive the others by at least 120 hours, the property is transferred to the
2 co-owners in proportion to their ownership interests.

3 **SECTION 54.** 854.03 (3) of the statutes is repealed.

4 **SECTION 55.** 854.03 (4) of the statutes is repealed.

5 **SECTION 56.** 854.03 (5) (d) of the statutes is amended to read:

6 854.03 (5) (d) The imposition of a 120-hour survival requirement would cause
7 a nonvested property interest or a power of appointment to fail to be valid, or to be
8 invalidated, under s. 700.16 or under the rule against perpetuities of the applicable
9 jurisdiction.

***NOTE: This section does not appear in an initial applicability provision.

10 **SECTION 57.** 854.03 (5) (g) of the statutes is created to read:

11 854.03 (5) (g) The statute or governing instrument specifies that this statute,
12 or one similar to it, does not apply.

13 **SECTION 58.** 854.03 (5) (h) of the statutes is created to read:

14 854.03 (5) (h) The transfer is under a governing instrument and the transfer
15 is controlled by a provision regarding survivorship that is included in a will, trust,
16 or marital property agreement executed by the transferor and that is intended to
17 apply to transfers under other governing instruments.

18 **SECTION 59.** 854.03 (5) (i) of the statutes is created to read:

19 854.03 (5) (i) The transfer is under a governing instrument and the court finds
20 ~~a contrary intent on the part of the person who executed the governing instrument.~~
21 *had a contrary intent.* The court may use ~~extrinsic evidence~~ *may be used* to construe that intent. *Please see explanation at Section 65*

22 **SECTION 60.** 854.03 (5) (j) of the statutes is created to read:

23 854.03 (5) (j) The imposition of a 120-hour survival requirement would be
24 administratively cumbersome and would not change the identity of the beneficiaries

*error in our
previous memo requesting this provision.*

1 ~~of the property,~~ the ultimate beneficiaries of the property, or the property that each
2 beneficiary would receive.

****NOTE: This section does not appear in an initial applicability provision.

3 SECTION 61. 854.03 (6) of the statutes is amended to read:

4 854.03 (6) EVIDENTIARY STANDARD. Unless the statute or governing instrument
5 provides otherwise, proof that an individual survived the period required under
6 subs. (1) to (4) this section must be by clear and convincing evidence.

7 SECTION 62. 854.03 (7) of the statutes is repealed.

8 SECTION 63. 854.04 (1) (a) of the statutes is amended to read:

9 854.04 (1) (a) Except as provided in subs. (5) and (6), if a statute or a governing
10 instrument calls for property to be distributed to the issue or descendants of a
11 designated person "by representation", "by right of representation," or "per
12 stirpes", the property is divided into equal shares for the designated person's
13 surviving children of the designated person and for the designated person's deceased
14 children who left surviving issue. Each surviving child and each deceased child who
15 left surviving issue are allocated one share.

16 SECTION 64. 854.04 (5) (intro.) of the statutes is amended to read:

17 854.04 (5) CERTAIN INDIVIDUALS DISREGARDED. (intro.) For the purposes of this
18 section subs. (1) to (3), all of the following apply:

19 SECTION 65. 854.05 (5) of the statutes is amended to read:

20 854.05 (5) CONTRARY INTENT. ^(a) This section does not apply to the extent that a
21 governing instrument, either expressly or as construed from extrinsic evidence,
22 provides otherwise if the court finds a contrary intent of the person who executed the
23 governing instrument. ^{had a contrary intent} The court ^{may be used} may use extrinsic evidence to construe that intent.

24 (b) A general directive to pay debts does not give rise to a presumption of exoneration.

Please see attached sheet.

Requested new provision:

854.035 If a will, trust, or marital property agreement contains a provision regarding survivorship that is intended to apply to transfers under other governing instruments, that provision shall control. Extrinsic evidence may be used to construe the intent of the person who executed the will, trust, or marital property agreement.

Committee Note:

This provision affirmatively allows a will, trust, or marital property agreement to “reach out” and affect the period of survivorship required under other governing instruments. It coordinates with new s. 854.03(5)(i), which creates an exception to the 120 hour survivorship requirement for the situation covered in this provision. Section 854.035 is necessary because s. 854.03(5)(i) does not itself make a “reach out” provision effective.

Note for Section 65, p. 18

We need to retain the passive voice, because we do not want to imply that the determination of intent must be found by a court. Several people who commented on the draft were concerned about this as a potential problem.

Some point re Sections 67, 74, 77, 98

1 **SECTION 66.** 854.06 (1) (b) of the statutes is repealed.

2 **SECTION 67.** 854.06 (4) (a) of the statutes is renumbered 854.06 (4) (intro.) and
3 amended to read:

4 854.06 (4) CONTRARY INTENT. (intro.) ~~This section~~ Subsection (3) does not apply
5 if there is ~~a finding of any of the following applies:~~ *if the person who executed the governing instrument had*

6 (c) ~~The court finds a contrary intent of the decedent.~~ *Keep* Extrinsic ~~The court may~~
7 use extrinsic evidence *Keep* may be used to construe that intent.

8 **SECTION 68.** 854.06 (4) (am) of the statutes is created to read:

9 854.06 (4) (am) The governing instrument provides that a transfer to a
10 predeceased beneficiary lapses.

11 **SECTION 69.** 854.06 (4) (b) of the statutes is amended to read:

12 854.06 (4) (b) ~~If the~~ The governing instrument designates one or more persons,
13 classes, or groups of people as contingent transferees, in which case those transferees
14 take in preference to those under sub. (3). ~~But~~ Unless par. (c) applies, if none of the
15 contingent transferees survives, sub. (3) applies to the first group in the sequence of
16 contingent transferees that has one or more transferees specified in sub. (2) who left
17 surviving issue.

18 **SECTION 70.** 854.07 (3) of the statutes is amended to read:

19 854.07 (3) If a governing instrument other than a will does not effectively
20 dispose of an asset that is governed by the instrument, that asset shall be paid or
21 distributed to the decedent's transferor's probate estate.

22 **SECTION 71.** 854.08 (5) of the statutes is renumbered 854.08 (5) (b) and
23 amended to read:

24 854.08 (5) (b) Subject to pars. (c) and (d) and sub. (6), if property that is the
25 subject of a specific gift is sold by a guardian *or mortgaged* ~~or~~ conservator, *or trustee* ~~or agent~~ of the person

1 who executed the governing instrument, or if a condemnation award or insurance
2 proceeds are paid to a guardian ~~or~~ conservator, ^{or trustee} ~~or agent~~, the specific beneficiary has
3 the right to a general pecuniary transfer equivalent to the proceeds of the sale ^{, mortgage,} ~~or the~~
4 condemnation award, or ~~the~~ insurance proceeds, reduced by any amount expended
5 or incurred to restore or repair the property if the funds are available under the
6 governing instrument. This provision

7 (c) Paragraph (b) does not apply with respect to a guardian or conservator if the
8 person who executed the governing instrument, subsequent to the sale ^{, mortgage,} or award, ^{the rights of the}
9 receipt of insurance proceeds, is adjudicated competent and survives such
10 adjudication for a period of one year; but in such event ^{a sale by a guardian or}
11 conservator within 2 years of that person's death is a sale by that person for purposes
12 of sub. (2). ^{specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4)}

13 **SECTION 72.** 854.08 (5) (a) of the statutes is created to read:

14 854.08 (5) (a) In this subsection, "agent" means an agent under a durable power
15 of attorney, as defined in s. 243.07 (1) (a).

16 **SECTION 73.** 854.08 (5) (d) of the statutes is created to read:

17 854.08 (5) (d) Paragraph (b) does not apply with respect to an agent ^{or trustee if the} ~~if any of~~
18 the following applies:-

19 ~~1. The person who executed the governing instrument is competent at the time~~
20 ~~of the sale~~ ^{, mortgage,} ~~or award or receipt of insurance proceeds.~~ ^{but in such event the}
21 ^{rights of the specific}

22 2. After the sale or award or receipt of insurance proceeds, the person who
23 executed the governing instrument executes a written document stating that the
24 specific beneficiary does not have a right to a general pecuniary transfer equivalent
25 to the proceeds of the sale or condemnation award or the insurance proceeds and the
person is competent when he or she executes the written document.

Covered by sub 6

Beneficiary shall be determined as though the proceeds were paid to the owner under sub (2), (3), or (4).

1 SECTION 74. 854.08 (6) (a) 1. of the statutes is amended to read:

2 854.08 (6) (a) 1. The ~~court finds a contrary intent of the person who executed~~
3 ~~the governing instrument, either expressly or as construed from. The court may use~~
4 ~~extrinsic evidence, shows the intent that a transfer fail under the particular~~
5 ~~circumstances to construe that intent.~~ *had a contrary intent. may be used*

6 SECTION 75. 854.08 (6) (a) 2. of the statutes is amended to read:

7 854.08 (6) (a) 2. The person who executed the governing instrument gives
8 property during the person's lifetime to the specific beneficiary with the intent of
9 satisfying the specific gift. ~~Extrinsic evidence may be used to construe that intent,~~
10 ~~and the requirement under s. 854.09 (1) is satisfied.~~ *fixed by formula or otherwise*

11 SECTION 76. 854.115 of the statutes is created to read:

12 **854.115 Valuation of distributed assets. (1) VALUATION OF IN-KIND**
13 **DISTRIBUTIONS AS OF DATE OF DISTRIBUTION.** A distribution of property in kind to a
14 distributee who receives a pecuniary transfer, a ~~fixed~~ dollar amount, or a fractional
15 share in a group of assets shall be made on the basis of the fair market value of the
16 property on the date of distribution. This subsection applies to distributions under
17 a governing instrument or under a statute, except that distributions under a
18 governing instrument are subject to subs. (2) and (3).

19 **(2) EXCEPTION IF GOVERNING INSTRUMENT PROVIDES OTHERWISE.** Subject to sub.
20 (3), if the distribution is made under a governing instrument, and the instrument
21 requires or permits a different value to be used, all assets available for distribution,
22 including cash, shall be distributed so that the assets distributed to satisfy the
23 transfer fairly represent the net appreciation or depreciation in the value of the
24 available property on the date of the distribution.

(3) CONTRARY INTENT. (a) This section does not apply if the distribution is made under a governing instrument and the court finds that the person who executed the governing instrument had a contrary intent. ^{may be used} ~~The court may use extrinsic evidence~~ to construe the contrary intent. ^(This omission changes the meaning of the provision.) Constitute authorization to

(b) A provision in a governing instrument that the personal representative or other fiduciary may fix values for the purpose of distribution does not of itself fix a value other than fair market value on the date of distribution.

***NOTE: This section does not appear in an initial applicability provision.

SECTION 77. 854.12 of the statutes is created to read:

854.12 Debt to transferor. (1) HEIR UNDER INTESTACY. (a) If an heir owes a debt to the decedent, the amount of the indebtedness shall be offset against the intestate share of the debtor heir. The property not distributed to the debtor heir, if it is not already, becomes part of the decedent's probate estate. If multiple revocable governing instruments transfer property to the debtor heir, the court shall determine how to equitably allocate the debt against the various instruments.

(b) In contesting an offset under par. (a), the debtor heir shall have the benefit of any defense that would be available to the debtor heir in a direct proceeding by the personal representative for the recovery of the debt, except that the debtor heir may not defend on the basis that the debt was discharged in bankruptcy or on the basis that the relevant statute of limitations has expired. If the debtor fails to survive the decedent, the court may not include the debt in computing the intestate shares ^{if any,} of the debtor's issue.

(2) RECIPIENT UNDER REVOCABLE GOVERNING INSTRUMENT. (a) Subject to par. (c), if a transferee under a revocable governing instrument survives the transferor and

Our request was to add this to section 2(a).
Please move these. Thanks.

1 is indebted to the transferor, the court shall treat the amount of the indebtedness as
2 an offset against ^{the} property to which the debtor transferee is entitled. ^{ADD BOXED SENTENCE FROM 1(a) HERE.}

3 (b) Subject to par. (c), in contesting an offset under par. (a), the transferee shall
4 have the benefit of any defense that would be available to the transferee in a direct
5 proceeding for the recovery of the debt, except that the transferee may not defend on
6 the basis that the debt was discharged in bankruptcy, unless that discharge occurred
7 before the execution of the governing instrument, or on the basis that the relevant
8 statute of limitations has expired. If the transferee fails to survive the decedent, ^{the} ~~the~~
9 ~~debt shall not be taken into account~~ ~~court may not include the debt~~ in computing the entitlement of alternate
10 beneficiaries. ^{Please return to passive voice of LRB 0718/P3. The instruction applies to trustees and others, not just to the court.}

11 (c) Paragraph (a) or (b) does not apply if the ~~court finds contrary intent of the~~ ^{had a contrary intent.}
12 person who executed the governing instrument. ~~The court may use~~ ^{may be used} extrinsic
13 evidence ^{to} ~~to~~ construe that intent.

14 SECTION 78. 854.13 (2) (gm) of the statutes is created to read:

15 854.13 (2) (gm) *Disclaimer by trustee.* The trustee of a trust named as a
16 recipient of property under a governing instrument may disclaim that property on
17 behalf of the trust if the governing instrument authorizes disclaimer by the trustee.
18 If the governing instrument does not authorize disclaimer by the trustee, the
19 trustee's power to disclaim is subject to the approval of the court.

20 SECTION 79. 854.13 (7) (a) of the statutes is amended to read:

21 854.13 (7) (a) Unless the transferor of the property or donee of the power has
22 otherwise provided otherwise in a governing instrument, either expressly or as
23 construed from extrinsic evidence, the disclaimed property devolves as if the
24 disclaimant had died before the decedent or before the effective date of the transfer
25 under the governing instrument. If the disclaimant is an appointee under a power

1 exercised by a governing instrument, the disclaimed property devolves as if the
2 disclaimant had died before the effective date of the exercise of the power. If the
3 disclaimant is a taker in default under a power created by a governing instrument,
4 the disclaimed property devolves as if the disclaimant had predeceased the donee of
5 the power. *← Keep →* This paragraph is subject to subs. (8), (9) and (10). *On second thought,
it seems preferable
not to remove this
sentence, because
removal may
create confusion.*

6 SECTION 80. 854.13 (8) of the statutes is amended to read:

7 854.13 (8) DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. *A Unless the*
8 decedent provided otherwise in a governing instrument, either expressly or as
9 construed from extrinsic evidence, a disclaimed interest in a joint tenancy passes to
10 the decedent's probate estate.

11 SECTION 81. 854.13 (9) of the statutes is amended to read:

12 854.13 (9) DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL
13 PROPERTY. *A-* Unless the decedent provided otherwise in a governing instrument,
14 either expressly or as construed from extrinsic evidence, a disclaimed interest in
15 survivorship marital property passes to the decedent's probate estate.

16 SECTION 82. 854.13 (10) of the statutes is amended to read:

17 854.13 (10) DEVOLUTION OF DISCLAIMED FUTURE INTEREST. ~~Unless the instrument~~
18 ~~creating the future interest manifests a contrary intent~~ transferor of the future
19 interest or donee of the power under which the future interest was created provided
20 otherwise in a governing instrument, either expressly or as construed from extrinsic
21 evidence, a future interest limited to take effect in possession or enjoyment after the
22 termination of the interest ~~which~~ that is disclaimed takes effect as if the disclaimant
23 had died before the effective date of the governing instrument or, if the disclaimant
24 is an appointee under a power exercised by a governing instrument, as if the
25 disclaimant had died before the effective date of the exercise of the power.

1 **SECTION 83.** 854.14 (1) of the statutes is repealed.

2 **SECTION 84.** 854.14 (3m) of the statutes is created to read:

3 854.14 **(3m)** EFFECT IF DEATH CAUSED BY SPOUSE. (a) *Definitions.* In this
4 subsection:

5 1. “Owner” means a person appearing on the records of the policy issuer as the
6 person having the ownership interest, or means the insured if no person other than
7 the insured appears on those records as a person having that interest. In the case
8 of group insurance, the “owner” means the holder of each individual certificate of
9 coverage under the group plan and does not include the person who contracted with
10 the policy issuer on behalf of the group, regardless of whether that person is listed
11 as the owner on the contract.

12 2. “Ownership interest” means the rights of an owner under a policy.

13 3. “Policy” means an insurance policy insuring the life of a spouse and providing
14 for payment of death benefits at the spouse’s death.

15 4. “Proceeds” means the death benefit from a policy and all other economic
16 benefits from it, whether they accrue or become payable as a result of the death of
17 an insured person or upon the occurrence or nonoccurrence of another event.

18 (b) *Life insurance.* 1. Except as provided in sub. (6), if a noninsured spouse
19 unlawfully and intentionally kills an insured spouse, the surviving spouse’s
20 ownership interest in a policy that designates the decedent spouse as the owner and
21 insured, or in the proceeds of such a policy, is limited to a dollar amount equal to
22 one-half of the marital property interest in the interpolated terminal reserve and in
23 the unused portion of the term premium of the policy on the date of death of the
24 decedent spouse. All other rights of the surviving spouse in the ownership interest

1 or proceeds of the policy, other than the marital property interest described in this
2 subsection, terminate at the decedent spouse's death.

3 2. Notwithstanding s. 766.61 (7) and except as provided in sub. (6), if an insured
4 spouse unlawfully and intentionally kills a noninsured spouse, the ownership
5 interest at death of the decedent spouse in any policy with a marital property
6 component that designates the surviving spouse as the owner and insured is a
7 fractional interest equal to one-half of the portion of the policy that was marital
8 property immediately before the death of the decedent spouse.

9 (c) *Deferred employment benefits.* Notwithstanding s. 766.62 (5) and except as
10 provided in sub. (6), if the employee spouse unlawfully and intentionally kills the
11 nonemployee spouse, the ownership interest at death of the decedent spouse in any
12 deferred employment benefit, or in assets in an individual retirement account that
13 are traceable to the rollover of a deferred employment benefit plan, that has a marital
14 property component and that is attributable to the employment of the surviving
15 spouse is equal to one-half of the portion of the benefit or assets that was marital
16 property immediately before the death of the decedent spouse.

17 (d) *Deferred marital property.* Except as provided in sub. (6), if the surviving
18 spouse unlawfully and intentionally kills the decedent spouse, the estate of the
19 decedent shall have the right to elect no more than 50% of the augmented deferred
20 marital property estate, as determined under s. 861.02 (2), as though the decedent
21 spouse were the survivor and the surviving spouse were the decedent. The court
22 shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent
23 of this paragraph.

24 **SECTION 85.** 854.14 (5) (a) of the statutes is amended to read:

1 854.14 (5) (a) A final judgment establishing criminal accountability for the
2 unlawful and intentional killing of the decedent conclusively establishes the
3 convicted individual as the decedent's killer for purposes of this section and s. 861.02
4 (8).

5 **SECTION 86.** 854.14 (5) (b) of the statutes is amended to read:

6 854.14 (5) (b) A final adjudication of delinquency on the basis of an unlawful
7 and intentional killing of the decedent conclusively establishes the adjudicated
8 individual as the decedent's killer for purposes of this section and s. 861.02 (8).

9 **SECTION 87.** 854.14 (5) (c) of the statutes is amended to read:

10 854.14 (5) (c) In the absence of a judgment establishing criminal accountability
11 under par. (a) or an adjudication of delinquency under par. (b), the court, upon the
12 petition of an interested person, shall determine whether, under based on the
13 preponderance of the evidence ~~standard~~, the killing of the decedent was unlawful
14 and intentional for purposes of this section and s. 861.02 (8).

15 **SECTION 88.** 854.15 (1) (e) of the statutes is renumbered 854.01 (3) and
16 amended to read:

17 854.01 (3) "Revocable", with respect to a disposition, provision, or nomination,
18 means one under which the decedent, at the time of the divorce, annulment or similar
19 event referred to, was alone empowered, by law or under the governing instrument,
20 to ^{or} ~~change/~~ revoke ~~or cancel~~ the designation in favor of the former spouse or former
21 spouse's relative, regardless of whether ~~or not~~ the decedent was then empowered to
22 designate himself or herself in place of ^a ~~the~~ former spouse or the former spouse's
23 relative designee, and regardless of whether ~~or not~~ the decedent then had the
24 capacity to exercise the power.

25 **SECTION 89.** 854.17 (title) of the statutes is repealed and recreated to read:

854.17 (title) Marital property classification and division.

SECTION 90. 854.17 of the statutes is renumbered 854.17 (1).

SECTION 91. 854.17 (2) of the statutes is created to read:

854.17 (2) Under s. 766.31 (3) (b), at the death of the spouse, marital property may be divided based on aggregate value rather than divided item by item.

****NOTE: I am not sure why s. 854.17 is renumbered and s. 854.17 (2) is created. Doesn't s. 854.17 already cover what s. 854.17 (2) now states? It states that ch. 766 covers property classification in chs. 851 to 882. As an aside, shouldn't this provision be renumbered to appear at the beginning of ch. 851 — doesn't it seem out of place?

SECTION 92. 854.18 (1) (a) (intro.) of the statutes is amended to read:

854.18 (1) (a) (intro.) Except as provided in sub. (3) or in connection with the share of the surviving spouse who elects to take an elective share in deferred marital property deferred marital property elective share amount of a surviving spouse who elects under s. 861.02, ~~a~~ the share of a surviving spouse who takes under s. 853.11 ~~(2) 853.12,~~ or ~~a~~ the share of a surviving child who takes under s. 853.25, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

SECTION 93. 854.18 (3) of the statutes is amended to read:

854.18 (3) If the governing instrument expresses an order of abatement, or if the decedent's transferor's estate plan or the ~~express or implied~~ purpose of the transfer, as expressed, implied, or determined through extrinsic evidence, would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

SECTION 94. 854.20 (1) of the statutes is renumbered 854.20 (1) (a) and amended to read:

854.20 (1) (a) Subject to par (b) and sub. (4) ~~(5)~~, a legally adopted person is treated as a birth child of the person's adoptive parents for purposes of intestate

Please see separate note

Please see separate memo

LRB 0349/P1
Sections 90-91

The provision is in ch 854 rather than 851 because it is a rule rather than a definition. We moved it here from ch 851 in the original legislation for that reason.

You raise a good point about proposed 854.17[2] – there are several provisions in ch 766 that relate to transfers of death and it doesn't make sense to single out this one for special mention. However, we do propose the following change to s. 854.17:

Original: **854.17 Classification; how determined.** In chs. 851 to 882, classification of the property of a decedent spouse and surviving spouse is determined under ch. 766.

Recreated: **854.17 Marital property classification and ownership and division of marital property at death.** Classification of the property of a decedent spouse and surviving spouse, and ownership and division of that property at the death of a spouse are determined under ch. 766 and s. 861.01.

